

February 29, 2008

TO: Honorable Members California Regional Water Quality Control Board,  
San Francisco Bay Region  
(via e-mail: [mrp@waterboards.ca.gov](mailto:mrp@waterboards.ca.gov))

FROM: Alan and Meg Giberson  
15561 Glen Una Drive  
Los Gatos, CA 95030

RE: **Comments re Municipal Regional Stormwater Permit Tentative Order NPDES No. CAS612008**

We appreciate the time that has been spent on drafting the Tentative Order. Thank you for the opportunity to participate and comment.

**ACTION LU-1.1** (Revised 2007): As written, the action appears in conflict with ACTION LU-2.7 (new 2007) which directs implementation of policies that protect and restore water quality, etc. Action LU-1.1 merely makes a discretionary recommendation.

Substitute “must” for “should” so that requirements will be mandatory. Action LU-1.1 language would then read:

- “Local land-use jurisdictions’ General Plans ~~should~~ must incorporate watershed wetlands and stream environments and must ~~to~~ reduce pollutants in runoff.” OR, somewhat less protectively:
- “Local land-use jurisdictions’ General Plans ~~should~~ must incorporate watershed wetlands and stream environments to ~~and~~ reduce pollutants in runoff.”

This change would eliminate confusing language in draft ACTION LU-1.1 as written, where the word “to” has no grammatical / syntactical function. It would also cure the apparent conflict with ACTION LU-2.7.

### **C.3.i Regulated projects:**

**C.3.i. i.** Mandatory implementation of only one of the stormwater lot-scale BMPs from the list leaves a great deal of potential run-off unregulated. Regulation should, at a minimum, require all listed BMPs. Further:

- Pervious concrete or pavers eventually become clogged with particulate matter, making this mitigation ineffective in the long term.
- The Order does not, but should give direction as to acceptable minimum distance(s) from the roof runoff or paved surface discharge point to edge of property, as a greater distance gives more protection from runoff. Such distances could be expressed as a percentage of lot size (width or depth, as applicable).

Also, because some jurisdictions are mostly single-family residential (*e.g.*, Cities of Saratoga, and Monte Sereno) with typically large residences being constructed (10,000+ square feet houses), large areas with significant streams will remain

significantly impacted by flows from these projects. Water bodies, flora and fauna cross jurisdictional boundaries and these rules therefore affect a broad swath of the Bay Area and its residents. More stringent requirements are needed for these single-family areas.

Typically, flows of water originating in single-family development projects bypass treatment plants. This allows untreated contaminants (organic and toxic wastes such as detergents, fertilizers, animal wastes and sediment) to run directly into streams, thus contaminating broad swaths of the South Bay watershed and, ultimately, San Francisco Bay.

**C.3.i. v.** Allowing task fulfillment by Permittees cooperating on a countywide or regional basis ignores the problems that exist where multi-jurisdictional groups<sup>1</sup> have promulgated standards for dealing with development affecting local waters<sup>2</sup>, but where adoption of those as mandatory standards by permittees has not occurred.<sup>3</sup> Better Water Board oversight of this area would better serve the public trust. A consistent, approach to streamside preservation through the implementation of agreed-upon policies is key

## **APPENDED LETTERS (5/2/07 AND 6/6/07) RE FAILURE BY PERMITTEE TO ADOPT G&S STANDARDS AS MANDATORY**

**May 2, 2007**

By personal delivery (10 copies to the Council)

**TO:** Honorable Members of the Saratoga City Council

**FROM:** Alan and Meg Giberson

**RE: Guidelines and Standards for Land Use Near Streams as recommended by the Santa Clara Valley Water Resources Protection Collaborative should be mandatory for Saratoga-controlled streamside projects**

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<sup>1</sup> such as the Santa Clara Valley Water Resources Protection Collaborative

<sup>2</sup> such as the Guidelines and Standards for Land Use Near Streams (G&S)

<sup>3</sup> Copies of submittals to the City of Saratoga on May 2, 2007, and on June 6, 2007, regarding this failure are being appended to the end of Order comments.

We appreciate the opportunity to comment on the City of Saratoga's proposed adoption of Guidelines and Standards for Land Use Near Streams (G&S) as recommended by the Santa Clara Valley Water Resources Protection Collaborative.

The proposed adoption should reflect mandatory adherence to the G&S regarding land-use projects adjacent to certain watercourses in the City of Saratoga (City), rather than mere use of the G&S as a "reference tool" as recommended in the staff report. The City should amend the City Code and General Plan to require application of the Guidelines so that all streamside development will comply with all portions of the Guidelines; such streamside development should also comply with standards previously required by the Santa Clara Valley Water District (District), if stricter than the G&S.

### CEQA ANALYSIS NEEDED

The City has declared this action exempt from CEQA, which declaration is improper, as discussed below. The City cannot proceed with staff's recommendation to use the G&S as a discretionary reference tool without conducting at least an Initial Study (IS) pursuant to the California Environmental Quality Act, CEQA, Public Resources Code § 21000 *et seq.*

City has a discretionary decision before it: it could make the G&S mandatory, discretionary, or decline to adopt. This is clearly an agency action, and has potential to cause either a direct physical or reasonably foreseeable indirect physical change in the environment, as discussed below. It is thus a "project" under CEQA.

The City staff report claims the project is exempt from CEQA review under the "common sense" exemption to CEQA, Guidelines Section 15061(b)(3) and under Guidelines Section 15308, Actions by Regulatory Agencies for Protection of the Environment, yet offers no substantial evidence in support of this claim.

Formerly the "District reviewed permit applications and imposed conditions on proposed development that would protect the adjacent watercourse in accordance with District standards." (Staff report, page 1). Saratoga proposes henceforth to "assume the responsibility for implementing stream protection programs..." for parcels adjacent to certain watercourses in the City—taking over this responsibility from the District. Staff report, page 2. The City's staff report contains a bald statement that "[t]he measures and policies contained in the Guidelines are consistent with and in some cases build upon what the City currently requires of project applicants who request permits for development near streams." Yet, there is no substantial evidence of this purported consistency, nor is there any discussion of specific sections of General Plan, Specific Plan, Zoning and/or Design Guidelines (Saratoga "rules") that are allegedly consistent with the G&S. Saratoga has not presented to the public any reasoned justification for its proposed decision.<sup>4</sup>

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<sup>4</sup> In contrast, Palo Alto, a sister city in the Collaborative, has adopted the G&S as mandatory, discussing the reasons for and importance of the years-long study and resulting standards.

The “preexisting standards” that the City purports to uphold are those of the District. There is no substantial evidence in the record that Saratoga standards can adequately take the place of either District standards (which formerly controlled land use near designated streams) or the new standards, which are community-wide standards, agreed upon by the members of the Collaborative. Yet, the City would, as stated in the staff report recommendation, substitute its own “existing General Plan policies, Residential Design Guidelines standards, and zoning ordinance requirements” for both the District’s and the new Collaborative standards. At the very least, the City must prepare an Initial Study (IS) pursuant to CEQA to address the effect of loss of District oversight and failure to adopt the G&S as mandatory.

Here, it is clear that there is a potential for one or more significant effects on the environment. The streams and creeks at issue represent areas of particular environmental sensitivity. A number of the affected waterways have been designated sensitive and/or critical.<sup>5</sup> See, also, reference to Saratoga Creek in the SCVURPPP Workplan for Conducting Watershed Analysis and Management Practice Assessment in Other Creeks Potentially Impaired by Sediment from Anthropogenic Activities.<sup>6</sup> The Santa Clara Valley Urban Runoff Pollution Prevention Program’s (SCVURPPP) January 2006 brochure—“Sediment Impact and Management Practice Assessments”—notes that sediment impacts can be severe to habitat and to animal populations, as well as to creek form.

Yet, the City’s proposed Resolution (No.\_\_\_\_) directs only that the G&S “be applied to streamside developments...to the extent feasible and appropriate, and to the extent that the Guidelines and Standards are consistent with Saratoga’s General Plan, Specific Plans, Design Guidelines and Zoning Ordinance....” [Emphasis added]

The City has not demonstrated that its General Plan, Specific Plans, Design Guidelines and Zoning Ordinance (collectively, “City rules”) would provide the equivalent protection for streams and creeks under its jurisdiction, as would be provided by mandatory application of the G&S or even by adherence to the District’s policies and regulations. The City has not even discussed the extent to which its rules offer equivalent or greater protection.

Clearly, City is proposing that its rules would govern in the case of a conflict. (The G&S are only to be “applied ...to the extent...that the [G&S] are consistent with Saratoga’s

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<sup>5</sup> Note, e.g., the SCVURPPP Hydromodification Management Plan (HMP) for Saratoga which lists Saratoga Creek, Wildcat Creek, Vasona Creek, Sobey Creek and San Tomas Aquino Creek (*inter alia*) among those where an HMP is encouraged (or required on projects over 50 acres).

<sup>6</sup> The SCVURPPP Workplan for Conducting Watershed Analysis and Management Practice Assessment in Other Creeks Potentially Impaired by Sediment from Anthropogenic Activities (Dated August 30, 2002, “Submitted in fulfillment of NPDES Permit Provision C.9.f.iii”) notes that the “Regional Board staff submitted comments on the sediment report [“Identification of Creeks Potentially Impaired by Sediment from Anthropogenic Activities”] as part of their July 8, 2002 letter to SCVURPPP stating the report was conditionally acceptable to the NPDES Permit Provision C.0.f.iii....” One of the conditions in that letter included the addition of Saratoga Creek to the “list of high priority streams for analysis.”

[rules].” Application of the G&S would necessarily involve—under the discretionary status proposed by City—an ad hoc balancing of City rules with the G&S *for each project before the City, with the City rules to control*. This does not provide the “clear, consistent guidance to property owners and developers” that is purportedly provided under the proposed staff report, Resolution, and City action; nor does it provide the Collaborative’s suggested protections. Similarly, it fails to provide the “commitment by the City of Saratoga to make best efforts to incorporate the Guidelines and Standards and associated implementation tools into appropriate land use review processes...” that the City ratified in its 7 December 2005 Resolution No. 05-074. City’s failure to mandate compliance with the G&S fails to implement the District’s goals of “standards to accomplish District purposes described in the ...Act and in Ordinance and to facilitate the implementation of District policies of providing a reliable supply of healthy and clean water; reducing the potential for flood damages; protecting and when appropriate enhancing and restoring natural resources of streams and watersheds when reasonable and appropriate.” (Water Resources Protection Manual, August 22, 2006)

Further, exemption under Guideline § 15308 is improper where, as here, there is a reasonable possibility that a project or activity may have a significant effect on the environment. *Wildlife Alive v. Chickering*, 18 Cal. 3d 190, 195 (1976). This is especially pertinent where the G&S will not be mandatory, but will function merely as a reference tool.<sup>7</sup>

Saratoga’s history of allowing development that has devastating effects on one or more streams demonstrates that the City rules (General Plan, zoning, etc.) and its general oversight of stream-side projects have been insufficient to protect streams under its jurisdiction from degradation. Demonstrably, the City’s past practices have resulted in the sort of severe environmental damage to one or more streams under its jurisdiction that the G&S are meant to avoid. (See, e.g., the color photos of damage to Willow Creek from several previous Saratoga-monitored projects, including a sewer installation along and through Willow Creek in 1985, water pipe installation through the creekbed in 1986, and the destructive Birenbaum development project in 1991-92.)

Saratoga, similarly, has failed to adhere to its own Design Review regulations that mandate inclusion of riparian corridors on a project’s site plan in recently processing the significant development at 19930 Sunset Drive in 2006.<sup>8</sup> In that

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<sup>7</sup> Mandatory G&S adoption might, arguably, fall within Guideline 15308’s ambit. The use of the G&S as one mere tool among many does not.

<sup>8</sup> Section 15-45.070 of the Saratoga Zoning Code states:

(a) Application for design review approval shall be filed with the Community Development Director on such form, as he shall prescribe. The application **shall include** the following exhibits:

(1) Site plan showing (i) property lines, (ii) easements and their dimensions, (iii) underground utilities and their dimensions, (iv) structure setbacks, (v) building envelope, (vi) topography, (vii) species, trunk diameter at breast height (DBH as defined in Section 15-50.020(g)), canopy driplines, and locations of all heritage trees (as defined in Section 15-50.020(1), trees measuring at least ten inches DBH, and **all native**

project, design review was approved without the site plan's showing the mandated riparian corridors, despite that issue having been brought to the City's attention multiple times. Partially as a result, drainage from that project to Willow Creek, and the non-extant sewer connection that may impact the creek, were never properly considered.

#### INITIAL STUDY NEEDED

Under the proposed resolution, City has an expanded role and powers, in that it would "assume the responsibility for implementing stream protection programs." (Staff report, page 2) Yet it offers no clear protection equivalent to the deleted District protection or the discretionary Collaborative G&S. The G&S are not "standards" where their application is only discretionary and is limited by overriding Saratoga General Plan, Specific Plan, Zoning and Design Guidelines (Saratoga "rules").

In conclusion, City rules and implementation will not supply the equivalent protection that would be afforded by the Guidelines and Standards. Until City either adopts the G&S as mandatory, or considers the effects of G&S's mere use as a reference tool in an Initial Study, the proposed Resolution should not be adopted this evening. The City needs to show how existing GP, specific plans, zoning are equally protective of, or more protective than, equivalent provisions of the protection manual's G&S, or adopt the G&S as mandatory parts of City rules.

**June 6, 2007**

TO: Honorable Members of the Saratoga City Council

FROM: Alan and Meg Giberson

**RE: Request reconsideration of SCVWRP Collaborative's Standards as mandatory; potential for bond monies to fund integration of G&S into City Codes**

On May 2, 2007, the City failed to adopt the Guidelines and Standards for Land Use Near Streams<sup>9</sup> ("G&S") as mandatory parts of City Code or its General Plan. Rather, the City has "adopted" the G&S as only discretionary, to the extent appropriate and feasible and to the extent consistent with City Code. Failing to make the G&S mandatory means that

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**trees measuring at least six inches DBH** on the property and **within one hundred fifty feet** of the property, (viii) areas of dense vegetation and (ix) **riparian corridors**. [Emphasis added]

<sup>9</sup> These community standards were developed by the Santa Clara Valley Water Resources Protection Collaborative as a result of a multi-party, multi-jurisdictional years-long effort culminating in the Water District's relinquishing permitting for lands adjacent to streams in February 2007, with the understanding that the involved jurisdictions would incorporate the G&S into the cities' processes.

projects will not be judged by clear standards, but that each affected project will instead be subject to staff interpretation of the interaction of G&S and City Codes and General/Specific Plan.<sup>10</sup> This plainly will not result in the consistent application of clear guidelines that was the intent of the Santa Clara Valley Water Resources Protection Collaborative.

The G&S provide the clarity of a defined protected riparian area. The G&S designate a “Streamside Protection Area [which] shall include all properties abutting or in proximity to a stream, including all properties located within 50 ft. from the top of bank”.<sup>11</sup> The 50-foot distance has no equivalent in the Saratoga Codes. Only sections 15-45.045 and 15-80.030 of Saratoga code specifically reference creeks and setbacks. Section 15-45.045 requires the minimum setback from creeks to be the minimum prescribed for the applicable zoning district. However, a search of the Code revealed no creek setback specified for any zoning district.<sup>12</sup> If the G&S were mandatory, the affected area would be clear. Without mandatory G&S, no creek will be provided a mandatory protected area.

Stream and streambank erosion are recognized as a problem area needing greater regulatory input. For instance, it “is generally acknowledged that erosion rates from construction sites are much greater than from almost any other land use activity.”<sup>13</sup> “Once soil is disturbed by grading and the operation of trucks and other heavy construction equipment, the disturbed land becomes vulnerable to erosion, and any significant rainfall event has the potential to cause large amounts of sediments, ...and other chemicals used in construction activities to wash down hillsides and into creeks, rivers, and their downstream water bodies. The result is the deterioration of water quality and harm to aquatic species and their habitats. Another significant consequence of construction projects is long-term impacts on the local hydrology (“hydromodification”). In particular, construction projects can result in the complete and long-term transformation of the local hydrology by directly or indirectly rerouting streams and paving the land ....”<sup>14</sup> Clearly, existing standards, such as the Best Management Practices (BMPs) required by Saratoga are not sufficient to protect waterways and water quality.

In fact, the Blue Ribbon Panel of Experts convened by the State Water Board to assess

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<sup>10</sup> An ad hoc, project by project, application will arguably also take more staff time than codification of the G&S.

<sup>11</sup> Guidelines & Standards for Land Use Near Streams, revised July 2006, page 2.9.

<sup>12</sup> In an online search of the Saratoga Code and General Plan databases, no creek setback was found for any of the zoning districts. “Setback” was defined in section 15-06.587 only as “the minimum distance between the structure and any lot line.” Section 15-80.030 only states that a recreational court “shall be designed to preserve the open space qualities of hillsides, creeks, public paths, trails and rights-of-way on or in the vicinity of the site.”

<sup>13</sup> Novotny, V. and H. Olem, 1994, *Water Quality: Prevention, Identification, and Management of Diffuse Pollution*, New York: Van Nostrand Reinhold. (Cited in the May 4, 2007 letter from California Coastkeeper Alliance and Santa Monica Baykeeper to the State Water Resources Control Board regarding the Preliminary Draft of NPDES General Permit for Discharges of Storm Water Associated with Construction Activities—“Letter”).

<sup>14</sup> Letter, page 2.

stormwater controls in California concluded that BMPs don't work: "It is critical to recognize that the BMP solution to storm water problems has been inadequate, based on 15+ years of experience with construction, ... storm water permits."<sup>15</sup> The Blue Ribbon Panel said, "the existing system for managing storm water pollution is not working, specifically recognizing in the construction context that "...traditional erosion and sediment controls are highly variable in performance, resulting in highly variable turbidity levels in the site discharge."<sup>16</sup>

The picture of stream siltation and degradation projected for the City Council and audience on May 2 vividly portrayed the consequence of lack of protection for creeks and riparian areas.<sup>17</sup> With the lands adjacent to Saratoga streams lacking the mandatory protections of the G&S and the former oversight of the Water District, these streams are at risk.

We are residents of the Saratoga Sphere of Influence, Life Members of the Sierra Club, and have lived in the area for many years—enjoying the benefits of creeks, creeklands, riparian areas and adjacent parks. We are thus beneficially interested in the protection of local creeks and adjacent land areas.

Saratoga's failure to adopt the G&S, as mandatory parts of its City Code, is a failure to continue previous protective policies. Along with the loss of the District's oversight, this represents a potential, impermissible relaxation of standards, which may allow environmental degradation. This is a significant environmental effect that should be considered in the appropriate environmental document—an Initial Study or EIR.

We appreciate the Council's expressed concern for creeks and its potential consideration of acting on appropriate creek protection before the elapse of a year during which the Council had directed staff to test application of the standards as discretionary-only. We look forward to working with the City to the best of our abilities in promoting timely adoption of these important standards.

If funding is a perceived impediment to incorporating the G&S as mandatory standards, a possible solution could be the monies to be made available pursuant to section 75001 of the Public Resources Code. This Code section represents the results of Prop 84's passage last November. Prop 84 (Clean Water Parks and Coastal Protection Bond) may provide more than \$5.4 billion for environmental restoration projects such as this. (Protection of rivers, lakes and streams constitutes one area of covered projects.) Another approach

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<sup>15</sup> Cited in the 5/4/07 Letter.

<sup>16</sup> Cited in the May 4, 2007 Letter. The Blue Ribbon Panel issued a report in June 2006, "Report on the Feasibility of Numeric Effluent Limitations Applicable to Discharges of Storm Water Associated with Municipal, Industrial and Construction Activities" ("Blue Ribbon Panel Report").

<sup>17</sup> The color transparency projected was of the Birenbaum development project entirely supervised by Saratoga in about 1991-92, under Saratoga regulations. Construction at the site resulted in large amounts of sediment that fouled Willow Creek, headwaters of San Tomas Aquino Creek that ultimately flows into San Francisco Bay.



might be incorporating the means used by other communities that have already incorporated the G&S as mandatory standards.<sup>18</sup>

We respectfully ask that staff be directed to place timely on the City Council agenda a reconsideration of the adoption of the Guidelines and Standards as mandatory standards.

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<sup>18</sup> Palo Alto, and other cities, have made the G&S mandatory parts of their city codes.